IN THE NEBRASKA COURT OF APPEALS

MEMORANDUM OPINION AND JUDGMENT ON APPEAL

STATE V. WIEDEL

STATE OF NEBRASKA, APPELLEE,
V.
KEVIN R. WIEDEL, APPELLANT.

Filed May 22, 2012. No. A-11-848.

Appeal from the District Court for Thayer County: VICKY L. JOHNSON, Judge. Affirmed.

Joseph H. Murray, P.C., L.L.O., of Germer, Murray & Johnson, for appellant.

Jon Bruning, Attorney General, and Kimberly A. Klein for appellee.

IRWIN, SIEVERS, and MOORE, Judges.

MOORE, Judge.

INTRODUCTION

Kevin R. Wiedel pled no contest to the charge of attempted driving under suspension, a Class I misdemeanor, and was sentenced to a 1-year term of imprisonment. Wiedel's sole assignment of error is that his sentence is excessive. Pursuant to this court's authority under Neb. Ct. R. App. P. § 2-111(E)(5)(b) (rev. 2008), this case was submitted without oral argument. Because we do not find an abuse of discretion in Wiedel's sentence, we affirm.

BACKGROUND

Wiedel was initially charged with driving under suspension, a Class IV felony. Pursuant to a plea agreement, Wiedel pled no contest to an amended charge of attempted driving under suspension, a Class I misdemeanor. Wiedel also agreed to execute an acknowledgment evidencing his understanding of his legal inability to operate any motor vehicle on a public roadway during the remaining term of his license revocation. Wiedel's signed acknowledgment was attached to the plea agreement and submitted to the court.

At the plea hearing, the State set forth the factual basis as follows: On March 21, 2011, an off-duty conservation officer observed Wiedel driving a four-wheeler or ATV on the river road near Hebron in Thayer County, Nebraska. A trooper responded to the conservation officer's report and observed Wiedel fixing a fence near an ATV in that location. Wiedel was not on the public road when the trooper arrived.

The district court accepted Wiedel's plea and found him guilty beyond a reasonable doubt of one count of attempted driving under suspension. The district court ordered that a previous presentence investigation (PSI) report prepared in February 2010 be updated for the sentencing hearing.

Wiedel's statement to the probation officer is included in the PSI. Wiedel indicated that he had been at the sale barn with his father, after which his father drove him to the river road to pick up some electric fence. Wiedel's father left Wiedel off at his four-wheeler which was located across the road from the fence. Wiedel drove the four-wheeler across the road to pick up the fence. Wiedel indicated that he usually drives the four-wheeler under the bridge to get to the other side of the road, but on this occasion, he drove across the road, since the fence was directly across from where the four-wheeler was located.

On October 6, 2011, a sentencing hearing was held before the district court. The county attorney indicated that he filed this case in order to "ram it home" to Wiedel and that the county attorney now believed Wiedel understood that he is not to drive.

The PSI reported that Wiedel is 49 years old, has a high school education, and is self-employed as a farmer-rancher. Wiedel is divorced and has four children, one of whom is a minor and for whom Wiedel pays child support of $500 per month plus health insurance of over $500 per month.

Wiedel's criminal history includes six convictions for driving under the influence (DUI) between 2001 and 2008. Wiedel was successfully released from probation for his first offense on August 8, 2002. Wiedel's next DUI offense occurred on October 31, 2003. This offense was originally charged as a second offense, but was dismissed and refiled as a first offense. Wiedel again received probation; however, his probation was revoked as a result of receiving another DUI charge on April 8, 2004. Wiedel was resentenced to 30 days in jail. As a result of the April 8 offense, Wiedel was convicted of DUI, second offense, for which he received 90 days in county jail and a fine. On November 7, 2005, Wiedel was charged with DUI, third offense (.15 or more), for which he was sentenced to 20 days in jail, was fined, and had his license suspended for 10 years. Finally, on December 14, 2008, Wiedel was charged with DUI, fourth offense, for which he was sentenced to 240 days in jail, was fined $5,000, and had his license revoked for 15 years.

Wiedel completed the Simple Screening Instrument (SSI), which is an assessment tool used to evaluate his alcohol and drug usage for the past 6 months. He scored 12 out of a possible 14, indicating a moderate to high degree of risk for alcohol or drug abuse. Wiedel also completed the DRI-II, which classified him as substance dependent. Overall, Wiedel's score was a medium low risk/need on the LS/CMI assessment. Wiedel has received alcohol treatment several times in the past, and he reported to the probation officer that he only occasionally drinks alcohol at the present time. He is attending Alcoholics Anonymous meetings once or twice a week.

The probation officer summed up his recommendation as follows:

> The Probation Officer is at a loss regarding a submission of a recommendation to the Court in this case. Obviously if the Court decides to sentence him to Probation, [Wiedel] would be a suitable candidate for a term, as long as he doesn't continue to consume alcohol. Otherwise, if the Court is not considering Probation in this case, then what would seem appropriate in this case would be a fine and court costs, as there was no indication of an agreement at sentencing in the Plea Agreement.

The county attorney indicated that he was satisfied with the recommendation of the probation officer regarding sentencing. Wiedel's attorney asked that the court impose a fine and that the matter be concluded.

The district court listed several factors that it considered in determining Wiedel's sentence: his prior criminal history, the "equivocal" recommendation of the probation department, and the testing which indicated Wiedel was at a medium to low risk to reoffend. Specifically, the judge stated:

> You have appeared in front of me three times in seven years. . . .
>
> At the last sentencing, you asked me for leniency. You promised me, you promised [the county attorney] you were going to quit drinking and you were going to quit breaking the law and you haven't done that. You admitted to the probation department that you continue to drink and you clearly continue to drive . . . .
>
> So I am convinced that you have not learned from your mistakes. I told you the last time you were in front of me that if I saw you again, I was going to send you to prison because you have not learned. Maybe you have learned now, but your disrespect for the law constitutes a risk to the citizens of Thayer County. I find that anything lesser would depreciate the seriousness of this offense.

Based on these factors, the court found that Wiedel was not a fit candidate for probation and sentenced Wiedel to a period of 1 year in jail in an institution under the Department of Correctional Services, plus court costs.

ASSIGNMENT OF ERROR

Wiedel asserts that the district court abused its discretion in imposing an excessive sentence.

STANDARD OF REVIEW

An appellate court will not disturb a sentence imposed within the statutory limits absent an abuse of discretion by the trial court. *State v. Kass*, 281 Neb. 892, 799 N.W.2d 680 (2011). An abuse of discretion occurs when the reasons or rulings of a trial judge are clearly untenable, unfairly depriving a litigant of a substantial right and denying a just result in matters submitted for disposition. *Id.*

ANALYSIS

Attempted driving under suspension is a Class I misdemeanor, punishable by not more than 1 year of imprisonment, a $1,000 fine, or both. Neb Rev. Stat. § 60-6,197.06 (Reissue 2010); Neb. Rev. Stat. § 28-201(4)(e) (Cum. Supp. 2010); Neb. Rev. Stat. § 28-106(1) (Reissue 2008). Wiedel was originally charged with a Class IV felony which could have resulted in a

maximum of 5 years' imprisonment, a $10,000 fine, or both. Neb. Rev. Stat. § 28-105(1) (Reissue 2008).

A sentence imposed within statutory limits will not be disturbed on appeal absent an abuse of discretion by the trial court. *State v. Erickson*, 281 Neb. 31, 793 N.W.2d 155 (2011). While the sentence imposed on Wiedel is within the statutory limits, he nevertheless asserts that the district court abused its discretion in sentencing him to the maximum imprisonment period. Wiedel argues that the district court ignored the recommendations of the probation officer for a sentence of probation or a straight fine plus court costs, which recommendations were agreed to by both the State and Wiedel.

It is clear under Nebraska law that granting probation rather than imposing a sentence of imprisonment is a matter which is left to the discretion of the trial court. See *State v. Alford*, 278 Neb. 818, 774 N.W.2d 394 (2009). Further, the judge is not bound by the recommendations of the probation officer in determining the sentence to be imposed. *State v. Johnson*, 240 Neb. 924, 485 N.W.2d 195 (1992).

Wiedel also argues that the district court failed to consider certain factors in determining an appropriate sentence. When imposing a sentence, a sentencing judge should consider the defendant's (1) age, (2) mentality, (3) education and experience, (4) social and cultural background, (5) past criminal record or record of law-abiding conduct, and (6) motivation for the offense, as well as (7) the nature of the offense, and (8) the violence involved in the commission of the crime. *Id*. In imposing a sentence, the sentencing judge is not limited to any mathematically applied set of factors. *Erickson, supra*. The appropriateness of a sentence is necessarily a subjective judgment and includes the sentencing judge's observation of the defendant's demeanor and attitude and all the facts and circumstances surrounding the defendant's life. *Id*. Both the nature of the offense for which a defendant is being sentenced and the defendant's past criminal record are appropriate considerations in sentencing. *Id.*

It is clear from the sentencing judge's comments that she focused primarily on Wiedel's criminal history, which is certainly a relevant factor and one often relied upon by appellate courts in reviewing a sentence for its excessiveness. The district court was concerned about Wiedel's numerous appearances before the court in recent years and found that Wiedel's driving while his license was suspended showed a disrespect for the law. The last time Wiedel was before this judge, he was told that if he was in court again that he would be going to prison. Despite this warning, Wiedel was back in court a year later on another felony charge. Although the charge was ultimately reduced to a Class I misdemeanor, the court did not find Wiedel's remorseful attitude convincing as he had sought leniency the last time he appeared before the court and had promised that he would not drink or break any more laws.

While the charge against Wiedel and the resulting sentence may seem rather harsh under the particular facts of this case, we cannot find that the district court's sentence, which was within the statutory limit, was clearly untenable or unfairly deprived Wiedel of a substantial right. Therefore, the sentence of the district court is affirmed.

CONCLUSION

For the reasons discussed herein, we conclude that the sentence imposed by the district court of 1 year's imprisonment for attempted driving under suspension is not excessive.

AFFIRMED.